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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BAHMAN KHODAYARI,

Plaintiff and Appellant,

v.

NINA MARINO et al.,

Defendants and Respondents.

B234028

(Los Angeles County
Super. Ct. No. BC449642)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John Shepard Wiley, Jr., Judge. Affirmed.

Bahman Khodayari, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and David B. Owen, for
Defendants and Appellants.

Plaintiff Bahman Khodayari appeals from a judgment entered after the trial court sustained defendants' demurrer to Khodayari's first amended complaint without leave to amend. We affirm.

BACKGROUND

Khodayari's First Legal Malpractice Action Against Criminal Defense Attorneys¹

In June 2010, Khodayari filed an action against lawyer Nina Marino and her law firm, Kaplan Marino (collectively, Marino), in case No. BC440187. He used a form complaint labeled "ATTY. RETAINER CONTRACT," and checked boxes indicating he was asserting causes of action for breach of contract and common counts. Khodayari's form complaint also included an attachment in which he asserted a cause of action for legal malpractice and included allegations supporting the malpractice cause of action.

Marino had represented Khodayari in a criminal proceeding (Super. Ct. L.A. County, 2006, No. 6CA02527) based on charges related to insurance and consumer fraud involving car repair estimates and billing. Khodayari was the chief executive officer and president of a car repair business. Khodayari originally was charged with 27 counts, but 19 were dismissed. In July 2008, Khodayari went to trial on the eight remaining counts and the jury convicted him on seven. Khodayari retained new counsel and appealed his misdemeanor convictions. This criminal proceeding was the basis for Khodayari's legal malpractice action against Marino.

Marino demurred to Khodayari's form complaint, arguing Khodayari could not state a cause of action for legal malpractice because he had not alleged factual innocence or that he had obtained postconviction relief in the criminal proceeding. Marino also argued Khodayari had failed to allege any facts supporting his breach of contract cause of action. Marino did not address Khodayari's common counts cause of action. Khodayari

¹ As discussed below, this first lawsuit is not before us on appeal, but is related to the current action. The facts regarding this first lawsuit are taken from our opinion in Khodayari's appeal in the first lawsuit. (*Khodayari v. Marino* (Nov. 4, 2011, B229260) [nonpub. opn.])

did not oppose the demurrer, file an amended complaint or appear at the hearing on the demurrer.

The trial court sustained the demurrer without leave to amend on grounds Khodayari could not plead actual innocence or postconviction relief in the criminal proceeding. At the hearing, Marino's counsel misrepresented to the court that Khodayari's misdemeanor convictions had been affirmed in full. In fact, Khodayari's appeal in the criminal proceeding had not yet been heard or decided. On November 1, 2010, the trial court dismissed Khodayari's first malpractice action against Marino. On December 3, 2010, Khodayari filed an appeal from the judgment.

Khodayari's Second Legal Malpractice Action Against Marino

On November 16, 2010—after the trial court dismissed his first action, but before he filed his appeal in that action—Khodayari filed the action presently before this court. In addition to Marino (Nina Marino and Kaplan Marino), Khodayari named Richard Kaplan (the other name partner of the firm) as a defendant (collectively, defendants).

In the first amended complaint, filed March 3, 2011, Khodayari asserted 17 causes of action against defendants: breach of contract, unjust enrichment, money had and received, breach of implied covenant, fraud, intentional misrepresentation, concealment, deceit, constructive fraud, negligent misrepresentation, negligence, professional negligence, breach of fiduciary duty, intentional infliction of emotional distress, abuse of process, civil conspiracy and violations of Business and Professions Code section 17200.

Khodayari alleged defendants committed wrongdoing while representing him in the criminal proceeding described above (No. 6CA02527), which arose from an investigation into his car repair business by the Bureau of Automotive Repair (BAR). A jury convicted Khodayari of three misdemeanor counts of insurance fraud and four misdemeanor counts of grand theft in that case. Khodayari refers to this criminal proceeding as “the ‘BAR Matter’” in his first amended complaint.

Khodayari also alleged defendants committed wrongdoing while representing him in another criminal proceeding (Super. Ct. L.A. County, 2007, No. 7PY0104). According to Khodayari's first amended complaint, this criminal proceeding arose from an

investigation by the Los Angeles Police Department (LAPD), the Los Angeles Department of Building and Safety (LADBS) and the Drug Enforcement Agency (DEA) regarding a search for stolen auto parts and illegal drugs at Khodayari's residence. Khodayari alleged he was charged with crimes involving improper storage of containers at his residence and using his property in violation of zoning laws. Khodayari claimed he pleaded guilty to one count (crime not specified), upon defendants' advice. Thereafter, he retained new counsel to represent him in the ongoing criminal proceeding. He does not allege the ultimate outcome of that proceeding. Khodayari refers to this criminal proceeding as the "Van Nuys Matter" in his first amended complaint.

Defendants continued to represent Khodayari in case No. 6CA02527 after he retained new counsel in case No. 7PY0104. Both of these criminal cases were pending when Khodayari first retained defendants to represent him. Khodayari refers to these cases collectively as "the 'Criminal Matters'" in his first amended complaint. He attached to his first amended complaint the retainer agreement with defendants, under which defendants agreed to represent Khodayari in both criminal cases.

Khodayari further alleged in his first amended complaint that defendants had represented they would pursue civil actions on his behalf against BAR, LAPD and LADBS for their harassment of Khodayari and civil rights violations. Khodayari claimed LAPD and LADBS demanded entry into his residence to search for stolen auto parts. When Khodayari asked to see a search warrant, officers "arrested [him] upon no grounds whatsoever and handcuffed him and detained him for several hours in the LAPD police cruiser, while they obtained a search warrant" DEA arrived after Khodayari had been arrested. According to Khodayari, officers searched his residence later the same day but did not find stolen auto parts or illegal drugs. Khodayari also asserted: "While Plaintiff was in custody of the LAPD, he was forced to adhere to DNA testing, which Plaintiff did not consent to and found to be excessive testing in light of the circumstances and nature of the allegations against Plaintiff in the Van Nuys Matter." In his first amended complaint, Khodayari did not elaborate on the claims or allegations he wanted to assert in these civil actions. He alleged defendants failed to pursue these matters.

In this action, Khodayari seeks return of the legal fees and expert fees he paid defendants (\$34,000 and \$4,245, respectively), \$19,500 in fees he allegedly paid to his new criminal defense lawyers in case No. 7PY0104, a “Civil Loss” of \$500,000, income loss of \$220,000, property loss of \$240,000 and “Emotional Loss” of \$1,000,000, for total damages of \$2,017,745.

In March 2011, defendants demurred to the first amended complaint in this action on grounds, including “that: (i) [Khodayari] has another action pending . . . against the same defendants that arises out of the exact same set of facts as the instant action; (ii) [Khodayari] has failed to plead any facts showing that he was actually innocent of the underlying charges; (iii) [Khodayari] has failed to obtain any form of post conviction relief attesting to his innocence of the underlying charges.”

Khodayari filed an opposition to the demurrer, arguing his second action against Marino is not the same as his first action against Marino which was pending on appeal. He noted he added Marino’s law partner, Kaplan, as a defendant and added 15 new causes of action. He also noted this action includes allegations which are not limited to Marino’s professional negligence during the trial in case No. 6CA02527—namely, allegations regarding case No. 7PY0104 and the civil actions defendants failed to bring. Khodayari also argued he had sufficiently alleged actual innocence and was pursuing postconviction relief in case No. 6CA02527.

On May 2, 2011, the trial court heard oral argument on defendants’ demurrer and sustained it without leave to amend. The court concluded this action “is a repeat of the first one” and this “second rehash of his first lawsuit is improper” On May 10, 2011, the court entered a judgment of dismissal.

On June 27, 2011, Khodayari filed his notice of appeal in this action.

This Court’s Decision in Khodayari’s First Lawsuit (B229260)

On November 4, 2011, after Khodayari filed his opening brief in the present appeal, we issued our opinion in the first lawsuit. (*Khodayari v. Marino, supra*, B229260.) We held the trial court correctly sustained the demurrer because Khodayari’s form complaint was inadequate. We also held, however, the trial court abused its

discretion in denying Khodayari leave to amend to allege factual innocence, given his appeal of his criminal convictions in case No. 6CA02527 was still pending. We further concluded Khodayari should be given an opportunity to amend his causes of action for breach of contract and common counts and to add additional causes of action against Marino.

Defendants' Motion to Dismiss This Appeal

On December 20, 2011, defendants filed a motion to dismiss the present appeal on grounds it is frivolous and moot. Defendants argued this appeal is frivolous because Khodayari's remedy after the trial court dismissed his first action against Marino was to appeal that dismissal, not file a second lawsuit against Marino. Defendants also argued this appeal is moot because this court reversed and remanded the first action, allowing Khodayari to allege additional causes of action against Marino, such as the 15 additional causes of action he alleged in this action. Defendants asked this court to issue monetary sanctions against Khodayari—\$9,625 to be paid to defendants and \$6,000 to be paid to this court. Defendants attached to their motion their correspondence to Khodayari informing him that they would seek sanctions against him if he did not dismiss this appeal.

Khodayari filed a written opposition to the motion to dismiss this appeal, asserting this "Second Case was not expressly filed as a replacement for the First Case, as the Second Case involves facts, issues and parties that are not a duplicate of the First Case, albeit there are some minor instances of overlap and similarity between the two cases." Khodayari argued this action is not moot because "[a]mendments to the pleadings in the First Case will still be subject to appropriate challenge, which may (for example) include challenges to such items as new facts or new parties [Marino's law partner, Kaplan] that were included in the Second Case." Khodayari also argued, "[a]t a minimum, in the Second Case, [he] should have at least been afforded further opportunity to amend the complaint in the Second Case to remove any facts and allegations that were actually a duplicate pleading of the First Case." Khodayari asserted defendants are not entitled to sanctions.

On January 10, 2012, Division Five of this district—where this matter originally was assigned—issued an order deferring ruling on the motion to dismiss and ordering Khodayari “to file a supplemental brief in which he sets forth the allegations he will allege in good faith concerning factual innocence in an amended complaint.” Khodayari filed his supplemental opening brief on February 1, 2012.

On May 11, 2012, this matter was transferred from Division Five to this Division because this Division issued the opinion in Khodayari’s first action against Marino, as discussed above. On August 24, 2012, we sent a letter to Khodayari informing him that this court was considering imposing sanctions on him for filing a frivolous appeal. Pursuant to California Rules of Court, rule 8.276(d), we invited Khodayari to file an additional opposition to defendants’ request for sanctions, which he did.

We deny defendants’ motion to dismiss and request for sanctions based on Khodayari’s argument there are allegations in this action which are not duplicative of his first lawsuit against Marino. Although we reject the merits of the argument, we do not find it to be frivolous.

Defendants’ Requests for Judicial Notice

First amended complaint in first action against Marino

On March 5, 2012, defendants requested Division Five take judicial notice of Khodayari’s first amended complaint in the first action against Marino (BC440187). Division Five granted the unopposed request for judicial notice. In his first amended complaint in that action, Khodayari asserted 15 causes of action against Marino (defined above as Nina Marino and Kaplan Marino): breach of contract, unjust enrichment, money had and received, breach of implied covenant, fraud, intentional misrepresentation, concealment, deceit, constructive fraud, negligent misrepresentation, professional negligence and breach of fiduciary duty. The action concerns Marino’s representation of Khodayari in criminal case No. 6CA02527. He seeks the same categories of damages he seeks in this action with the exception of the \$19,500 in fees he allegedly paid to his new criminal defense lawyers in case No. 7PY0104 and the “Civil Loss” allegedly resulting from defendants’ failure to pursue civil actions against the

various enforcement agencies. The subject matter of these two lawsuits overlaps, but in this action Khodayari includes additional allegations about his guilty plea in case No. 7PY0104 and the unspecified civil actions he believes defendants should have pursued.

Appellate decision affirming convictions in case No. 6CA02527

On August 7, 2012, defendants filed papers requesting this court take judicial notice of the decision (18-page opinion) of the Appellate Division of the Los Angeles Superior Court affirming all of Khodayari's misdemeanor convictions in criminal case No. 6CA02527. (*People v. ABHM, Inc.* (Jul. 18, 2012, BR046962).) Khodayari opposed the request for judicial notice, arguing "the instant appeal does not concern post-conviction relief, actual innocence or such other matters related to the Criminal Appeal and its purported outcome. Rather, the instant civil appeal concerns only whether the First Marino Case and the Second Marino Case are duplicative of each other, and whether the trial court was correct in dismissing the complaint in the Second Marino Case" Defendants raised the issues of actual innocence and post-conviction relief in the demurrer before us on appeal. The appellate decision is germane. We grant defendants' request for judicial notice.

Decision in first lawsuit sustaining demurrer without leave to amend

On September 27, 2012, defendants requested this court take judicial notice of the trial court's order in the first lawsuit, case No. BC440187, sustaining defendants' demurrer to Khodayari's first amended complaint without leave to amend on grounds Khodayari could not show factual innocence in criminal case No. 6CA02527 because his criminal convictions were affirmed. We grant defendants' unopposed request for judicial notice.

Request for Further Briefing in This Appeal

On September 17, 2012, we sent a letter to the parties requesting Khodayari serve and file a letter brief setting forth (1) which particular allegations in his first amended complaint in this action he believes are not duplicative of allegations alleged in his first lawsuit, case No. BC440187, and (2) how he could amend his complaint in this action to

explain the nature of the “Civil Matters” he claims defendants failed to pursue on his behalf, as referenced in his first amended complaint in this action. Khodayari filed a letter brief and defendants filed a responding letter brief.

DISCUSSION

Khodayari concedes allegations regarding defendants’ legal representation in criminal case No. 6CA02527 (the BAR Matter)—the majority of the allegations in the first amended complaint—should not have survived defendants’ demurrer in this matter because these allegations are duplicative of his first lawsuit against Marino. Khodayari contends, however, the trial court erred in sustaining the demurrer without leave to amend because his first amended complaint includes allegations which are not duplicative of his first lawsuit. He argues he can state a cause of action against defendants in this action with allegations regarding defendants’ legal representation in criminal case No. 7PY0104 (the Van Nuys Matter), failure to pursue civil actions on his behalf against BAR, LAPD and LADBS, and improper billing practices. As discussed below, Khodayari has not demonstrated he can state a cause of action against defendants in this case.

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “We also consider matters which may be judicially noticed.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]” (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.)

The Van Nuys Matter

Khodayari cannot dispute the Van Nuys Matter was within the scope of the first lawsuit he filed against Marino. He labeled his form complaint in the first lawsuit “ATTY. RETAINER CONTRACT.” The March 16, 2007 retainer agreement between defendants and Khodayari, which is attached to the first amended complaint in this second action, covers defendants’ legal representation in both the BAR Matter and the Van Nuys Matter. In the first action, Khodayari sought return of the retainer fee he paid defendants for both criminal proceedings. Thus, defendants properly demurred to the first amended complaint on grounds “[t]here is another action pending between the same parties on the same cause of action.” (Code Civ. Proc., § 430.10, subd. (c).)²

Regardless of whether Khodayari should have asserted these allegations concerning the Van Nuys Matter in the first lawsuit, he cannot state a cause of action against defendants based on these allegations. As he acknowledges in his first amended complaint in this action, Khodayari pleaded guilty to one, unspecified criminal count in the Van Nuys matter. He thereafter retained new counsel to represent him in the Van Nuys matter. In order to prevail against defendants regarding their legal representation in the Van Nuys Matter, Khodayari must plead and prove actual innocence. (*Lynch v. Warwick* (2002) 95 Cal.App.4th 267, 270-273, 275 [“the actual innocence requirement for a criminal legal malpractice case applies regardless of whether the former criminal defendant is seeking damages for a wrongful conviction, a longer sentence, or for attorney fees”].) Notwithstanding the label Khodayari gives to the various causes of action he asserts against defendants, he is seeking damages for defendants’ allegedly inadequate representation. Khodayari cannot establish actual innocence in the Van Nuys Matter. Accordingly, these allegations fail to state a cause of action against defendants.

² The fact Khodayari added Richard Kaplan, the other name partner of the law firm, as a defendant in this case does not defeat a demurrer on this ground. Both lawsuits cover the same legal representation under the same retainer agreement.

Civil Matters

In his first amended complaint, Khodayari alleges defendants promised they would pursue civil actions on his behalf against BAR, LAPD and LADBS “and any other government agencies or third party regarding “civil rights violations and other claims.” Khodayari asserted LAPD and LADBS conducted an improper search and seizure at his residence at the time of his arrest on charges filed in the Van Nuys Matter. He also alleged, “While Plaintiff was in custody of the LAPD, he was forced to adhere to DNA testing, which Plaintiff did not consent to and found to be excessive testing in light of the circumstances and nature of the allegations against Plaintiff in the Van Nuys Matter.” The retainer agreement attached to Khodayari’s first amended complaint does not discuss legal representation in any civil matters.

Khodayari has not shown he can state a cause of action against LAPD or LADBS based on search and seizure issues. In his first amended complaint, he alleged he told officers they could not search his residence without a search warrant. The officers handcuffed him and detained him while they obtained a search warrant. The officers searched his residence after they obtained a search warrant. Khodayari has not cited any authority demonstrating this procedure was unlawful. With respect to his allegation about DNA testing while in LAPD custody, Khodayari has not cited any authority supporting his claim the testing violated his rights. Assuming defendants breached an oral agreement to represent him in a civil action against LAPD and LADBS, Khodayari has not shown he can establish a probability of prevailing on a claim against the LAPD or LADBS and thereby establish damage from defendants’ breach.

We asked Khodayari to file a letter brief addressing how he could amend his complaint in this action to explain the nature of the “Civil Matters” he claims defendants failed to pursue on his behalf. Khodayari filed the requested letter brief, but did not set forth any additional factual allegations about these civil matters. He has not shown he can state a cause of action against defendants for failing to file a civil matter on his behalf.

Improper Billing

Khodayari argues allegations in the first amended complaint in this action regarding defendants' improper billing practices are not duplicative of his first lawsuit against Marino. We disagree. In the first lawsuit, Khodayari seeks return of the same legal fees he seeks in this action. Moreover, the billing improprieties which purportedly damaged him—fees for a writ and expert witness—occurred in the BAR Matter, the action he concedes is within the scope of the first lawsuit and not a proper subject of this lawsuit.

The trial court did not err in sustaining the demurrer to the first amended complaint without leave to amend. Khodayari has not demonstrated he could amend his complaint to state a cause of action against defendants in this action.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.